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Supreme Court of the United States

OCTOBER TERM, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAG-TAB PUBLICATIONS CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

—against—

THE STATE OF ARKANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

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BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

Statement

This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. ("CPDA"), with the consent of all parties to this action, in support of the constitutionality of Act 261 of the Arkansas Acts of 1961 (hereinafter "the Arkansas Act" or "the Act").*

*CPDA has also filed a brief *amicus curiae* in support of petitioners' appeals in *Redrup* v. *New York* (No. 3) and *Austin* v. *Kentucky* (No. 16).

Interest of the *Amicus Curiae*

CPDA is a national trade association of more than 700 local independent wholesalers of magazines and paperback books. Its members distribute all leading magazines (for example, *Life, Newsweek, Look, Saturday Evening Post, Readers Digest* and *Woman's Day*) and all leading lines of paperback books (for example, Pocket Books, Bantam Books, Dell and New American Library).

Both as citizens and as small businessmen who are concerned with the image of the publishing industry, the members of CPDA are anxious to prevent the dissemination of obscene material. However, they are also concerned that the freedom of speech guaranteed by the First and Fourteenth Amendments may be negated by over-restrictive criminal obscenity legislation. In order to achieve a balance between the public interest in controlling obscenity on the one hand, and the right to freely publish and disseminate constitutionally protected and controversial literature on the other, CPDA vigorously supports the enactment of statutes, such as the Arkansas Act, which permit law enforcement officers to enforce obscenity laws through either injunctive or criminal proceedings.

It has been the experience of CPDA members that when a state's only weapon against obscenity is a criminal statute, officials are reluctant to prosecute, and obscenity actions are few and far between. There are two explanations for this reluctance. First, the state prosecutor knows that the local wholesaler handles thousands of publications, and that it is unjust to hold him criminally accountable for selling a book which he could not have possibly read and may not have even seen. Even if the prosecutor is unconcerned with the injustice of such a criminal prosecu-

tion, he may well be reluctant to proceed because of the difficulty in proving scienter.

Second, since local magazine and paperback wholesalers, such as the members of CPDA, are not criminals in any sense of the term, and are usually responsible community leaders, the local prosecutor (who frequently knows the local wholesaler) may be loath to injure the wholesaler's reputation by making him a defendant in a criminal action. For, whether the local wholesaler wins or loses the criminal action, his good name is besmirched by its mere commencement.

When state officials are reluctant to prosecute criminal obscenity laws, unscrupulus publishers and distributors—usually from outside the state, immune to local opinion and risking no local reputation—feel relatively free to disseminate obscenity.

However, it has also been the experience of members of CPDA that where there are no statutory provisions for injunctive proceedings against obscenity, local wholesalers and retailers, who are anxious to obey the law and who fear prosecution, will refrain from handling constitutionally protected controversial literature, thereby diluting the rights guaranteed by the First Amendment and curtailing the buyer's freedom to read.

The injunction provisions of the Arkansas Act effectively prevent the distribution of obscene literature without needlessly destroying the reputations of local businessmen and without, in any way, inhibiting First Amendment rights. Together with the criminal provisions of the Act, these injunction provisions give public officials two satisfactory tools with which to enforce obscenity laws.

If the Arkansas Act is held unconstitutional, comparable (in some instances, virtually identical) injunction statutes in at least 25 other states will fall with it or become very

suspect.* Based on their experience in the publishing industry, the members of CPDA believe that this would be a public and personal disaster which could serve only to (a) impede the distribution of constitutionally protected literature, (b) inhibit law enforcement officers from prosecuting obscenity laws, and (c) unfairly endanger their own reputations.

The Act

Purpose and Scope

The Arkansas Act is closely modeled upon a proposed anti-obscenity statute drafted and circulated by CPDA. The purpose of the Arkansas Act, as set forth in the Act itself (§ 2), and in the Introduction to the CPDA proposed statute, is: (a) to provide prosecuting attorneys with a

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*The following states have injunction statutes similar to the Arkansas Act:

Alabama (Ala. Code Tit. 14, § 374 (1961)); Arizona (Ariz. Rev. Stat. Ann. § 13-535 (1964)); Colorado (Colo. Rev. Stat. §§ 40-9-16 to 40-9-25 (1963)); Connecticut (Conn. Gen. Stat. Ann. §§ 53-244a to 53-244l (1963)); Florida (Fla. Stat. Ann. § 847.011 (1965)); Georgia (Ga. Code Ann. §§ 26-6301a to 26-6309a (1958)); Idaho (Idaho Code §§ 18-1506 to 18-1510 (1957)); Kansas (Kan. Gen. Stat. Ann. §§ 21-1102 to 21-1120 (1961)); Maryland (Md. Ann. Code, art. 27 §§ 418 to 418A (1951); 418B (1961)); Massachusetts (Mass. Ann. Laws, Ch. 272, §§ 28C to 28F (1945)); Michigan (Mich. Stat. Ann. § 27A. 2938 (1962)); Mississippi (Miss. Code Ann. §§ 2674-01 to 2674-19 (1962)); Missouri (Mo. Rev. Stat. § 563.285 (1965)); Nebraska (Neb. Rev. Stat. §§ 28-926.02 to 28-926.08 (1961)); New Jersey (N. J. Stat. Ann. §§ 2A:115-3.3 to 2A:115-3.9 (1962)); New York (N. Y. Code Crim. Proc. § 22-a); Ohio (Ohio Rev. Code Ann. § 2905.34.3 (1959)); Oklahoma (Okla. Stat. Ann. tit. 21, §§ 1040.1 to 1040.3 (1957)); Rhode Island (Rhode Island Gen. Laws Ann. §§ 11-31.1-1 to 11-31.1-12 (1963)); Tennessee (Tenn. Code Ann., § 39-3005 (1965)); Texas (Vernon's Ann. Penal Code. art. 527 (1961)); Utah (Utah Code Ann. §§ 76-39-5 to 76-39-15 (1963)); Virginia (Va. Code Ann. § 18.1-236.3 (1960)); Washington (Wash. Rev. Code, §§ 7.42.010 to 7.42.900 (1959)); Wisconsin (Wis. Stat. Ann., § 269.565 (1957)).

"speedy civil remedy for obtaining a judicial determination of the character and contents of publications"; (b) to provide prosecuting attorneys "with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene literature within" Arkansas; (c) to permit prosecuting attorneys to proceed by injunction proceedings as well as by criminal prosecution; and (d) to eliminate the situation under which the obscenity of a challenged publication can be tested only by a criminal action against a local wholesaler or retailer. (The Arkansas Act is set forth in Appendix A. The Introduction to the statute proposed by CPDA is set forth in Appendix B.)

The unfairness and irrationality of an exclusive criminal remedy is described in the Introduction to the CPDA proposed statute (p. A-11, *infra*):

> "To date, such challenge [concerning the obscenity or non-obscenity of a publication] has customarily been by criminal arrest and trial with its attendant and often unjustified odium. Whether the outcome of such trial results in the acquittal of the wholesaler or dealer is dependent in large measure upon his ability correctly to predict at the start of his distribution through his uninformed judgment the legal propriety of the publication in question, a hazardous occupation for which he has no training or desire to exercise a unilateral censorship."

The Arkansas Act provides both a criminal and civil remedy against the sale of obscene publications. Although the proceedings below concern the civil provisions only, and although the criminal provisions are not involved on this appeal, the arguments raised by appellants require a consideration of the Act as a whole.

Mailable Matter

Basic to the statutory scheme is the concept of "mailable matter". Under the Arkansas Act, a writing is "mailable" if it has "second class mailing privileges" or "has not been determined to be nonmailable under the laws of the United States". (§ 3 (1))

The Criminal Provisions

A criminal prosecution for the sale or distribution of an obscene publication, "with knowledge of its contents," can be brought only if the publication in question is nonmailable, or has been, to the defendant's knowledge, "judicially found to be obscene" in a prior Arkansas proceeding under the Act. Unlike the civil provisions, there are no provisions for criminal "long-arm" jurisdiction over out-of-state publishers or distributors. (§ 4; compare §§ 5 and 16) Extradition may be attempted only if: (a) the defendant has been a respondent in a prior civil proceeding brought under the Act; (b) an order was entered in that proceeding prohibiting the defendant from shipping into Arkansas specified publications which were found obscene in that proceeding; (c) the defendant is subsequently charged with *"continuing violations"* of that order; and (d) the order is not on appeal. (§§ 14, 11 and 10) (Emphasis added.)

The Civil Provisions—Actions to Determine Obscenity

A prosecuting attorney may commence an "action to determine obscenity" if he has reasonable cause to believe that any person, "with knowledge of its contents," is shipping a mailable obscene publication into Arkansas or is selling such a publication in that State. The respondents in the action are the persons responsible for the publication being sold in Arkansas. (§§ 5 and 6)

If, after a full adversary proceeding, the publication is found to be obscene, the respondents may be enjoined from further distribution of that publication in Arkansas, and respondents residing in Arkansas may be required to dispose of such publications. (§ 10) The injunction, which can only prohibit a respondent "from doing or continuing to do any act condemned by this Act," can, under the terms of the Act, have no extra-territorial effect. (§§ 10, 5 and 6(e)) Disobedience of any injunction entered pursuant to the Act constitutes contempt of court, but contempt, by itself, is not sufficient to permit the Governor to seek extradition. (§§ 13 and 14)

The Act does not permit any type of injunction *pendente lite*.

With respect to jurisdiction in civil proceedings, the Act provides that "in order to protect the morals and general welfare of the citizens and residents of" Arkansas against obscene matter "originating outside" the State, "persons who are responsible for the importation" of such obscene matter into Arkansas are subject to the jurisdiction of the Arkansas courts in any civil (not criminal) proceeding concerning that matter. Notice of such proceedings is sent to out-of-state respondents by registered or certified mail. (§ 7)

What the Act Does Not Provide

Appellants' characterization of the Act is at odds with the Act's clear language in several significant respects.

Appellants' contentions and suggestions to the contrary notwithstanding, the Act: (a) does not relate to non-obscene publications (5-6, 9, 10)*; (b) does not, in any way, affect the out-of-state operations of non-resident publishers or distributors (6, 9, 10, 17); (c) does not seek to

*All references in this paragraph are to Appellants' Brief.

control the composition and publication of writings in other states (6, 17); (d) does not subject non-residents to jurisdiction under the criminal provisions of the Act "by reason of having sent books" into Arkansas (6-7, 11) (the "long-arm" section of the Act applies to civil proceedings exclusively); (e) does not impose criminal penalties upon anybody for the shipment of "any obscene matter" (7, 8) (the criminal provisions may be invoked only if the publication is nonmailable, or has been previously adjudged obscene under the Act); (f) does not require out-of-state seizure of anything by Arkansas sheriffs (7, 10) (how could it?); and (g) subjects out-of-state publishers to felony prosecutions only if there has been a prior determination of obscenity (8).

No matter what appellants may say, the Act is nothing more than an attempt to control obscenity in Arkansas (and only in Arkansas) through a limited use of equity power and the criminal laws.

The Proceedings Below and the Decree Appealed From

The Prosecuting Attorney of the Eleventh Judicial District, Arkansas, commenced a civil proceeding under the Act to have the magazines in question declared obscene. The complaint sought relief against a retailer and wholesaler in Pine Bluff, Arkansas (and no one else) who are not appellants here. The complaint prayed that these local sellers (and no one else) be enjoined from distributing the magazines in question and be required to dispose of these magazines. (1-3)*

Although they were not named as defendants in the complaint, and although no relief was sought against them (1-3), the appellant publishers appeared and answered.

*Unless otherwise indicated, this, and all subsequent references, are to the record on appeal.

They challenged the constitutionality of the Act in general terms. They raised no specific objection to the statute's "long-arm" provisions however, and did not challenge the court's personal jurisdiction over them. (6-8, 11-12)

No preliminary injunction was sought or granted. (16)

After a full trial before a jury, each of the magazines in question was found obscene by the jury and by the court. (28-29) The court then entered a decree (28-30) enjoining defendants from sending the issues in question into Jefferson County, Arkansas, or from selling such issues in that county. The final paragraph of the decree provided that the court would enjoin distribution of future issues of the magazines *if* they were found to be obscene, and it retained jurisdiction for that purpose; however, the injunctive provisions of the decree did not in any way apply to future issues, and were limited to the issues specifically identified in the complaint.

The Position of CPDA

Ten questions were raised in the Notice of Appeal to this Court, but probable jurisdiction was noted on the first two only. These questions challenged the constitutionality of the Act on its face and as applied on the grounds that "it operates as a forbidden restraint on expression", and is "vague and uncertain". Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Stewart stated that they would note probable jurisdiction without limitation. (62-64)

CPDA contends that, on its face and as applied, the Act does not operate as a restraint on expression and is not vague and uncertain. It is the position of CPDA, however, that the decree of the chancellor should be reversed on the grounds (a) that the publications in question are not obscene, and (b) that, in passing upon the question of obscenity, the jury and court should have considered con-

temporary community standards in the nation as a whole. See *State* v. *Keyhole Publishing Co.*, 3 Conn. Cir. 354, 214 A. 2d 838, *appeal dismissed*, 213 A. 2d 842 (1965), where the Appellate Division of the Circuit Court of Connecticut refused to pass upon the constitutionality of Connecticut's obscenity injunction statute because the publications in question were not obscene. See also *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964), where this Court made an independent determination on the issue of obscenity, and *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578 (1961), where magazines similar to those here involved were found non-obscene.

We would note that this is not a declaratory judgment action. The only matters actually at issue between the parties are the terms of an order entered pursuant to the Act. We would hope that the opinion of this Court would be limited to the issues actually involved in the case. See *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO* v. *Missouri*, 361 U. S. 363 (1960); *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 459-461 (1945). However, as appellants have raised arguments which go beyond the facts of the case, we shall attempt to deal with such arguments as well.

POINT I

THE ACT IS NOT UNCONSTITUTIONAL ON ITS FACE, OR AS APPLIED, IN THAT IT OPERATES AS A FORBIDDEN RESTRAINT ON EXPRESSION.

A. The Injunctive Provisions Are Constitutional on Their Face and as Applied.

1. The Purpose and Effect of Equity Proceedings

In any judicial proceeding concerning governmental regulation of obscenity, the central question is whether the regulation operates so as to impair the distribution of con-

stitutionally protected literature. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Butler* v. *Michigan*, 352 U. S. 380 (1957). The injunctive provisions of the Arkansas Act do not, and can not, have that effect. On the contrary, while criminal obscenity statutes can only serve to deter the sale of non-obscene literature dealing with sex, injunction proceedings (such as those involved here) will actually serve to remove inhibitions upon the distribution of constitutionally protected literature.

If obscenity is regulated by the criminal law alone, any publication dealing with sex poses a serious threat to the reputation and freedom of the publisher and distributor of that publication. The necessary indefiniteness of obscenity laws, and (in the case of distributors) the large number of publications handled, makes it virtually impossible for the ordinary businessman to determine whether many publications are obscene. Rather than run the grave risk of prosecution, many publishers and distributors will throw in the towel to the censors and abandon any literature dealing with sex. The result will be that a great deal of constitutionally protected literature will go undistributed and, perhaps, unpublished. This, in fact, is what is now happening in many areas of the country where criminal prosecution is the sole weapon against obscenity.

The Arkansas Act has the purpose and effect of enforcing the public interest in suppressing obscenity without simultaneously eroding the freedom of speech guaranteed by the First Amendment. Under this Act, a publisher or distributor can proceed with the knowledge that so long as he is handling material which is mailable (as defined in the Act), and which has not been judicially declared obscene by an Arkansas court, he is not subject to criminal prosecution. Freed from this fear, the publisher or distributor will not yield to anxieties concerning an

unwarranted criminal prosecution. The result here can only be a more free dissemination of constitutionally protected literature.

On the other hand, the Arkansas Act permits Arkansas to effectuate its public policy against the distribution of obscenity within its borders. If a publication is obscene, a speedy judicial determination can be had on the question of obscenity, and an injury to the public can be prevented without needless damage to anyone's reputation and without impairing free spech. If, in blatant defiance of its laws, a defendant handles obscene literature which is nonmailable, or which has been held obscene in a prior Arkansas action, the State can proceed under its criminal laws, provided that there is jurisdiction over the person. (As noted at pp. 6-8 above, the Act's "long-arm" provision applies to civil proceedings exclusively, and extradition can be attempted only under extraordinary circumstances.)

In addition, the presence of the injunction provisions promotes a more meaningful and thorough enforcement of obscenity laws since, for the reasons noted above (pp. 2-3), state prosecutors will generally be more willing to proceed under injunction statutes than under criminal statutes.

Arkansas has chosen this technique to protect its citizens from obscenity while preserving their constitutional rights of free speech. Although some may feel that the Arkansas technique is too lenient, while others may feel that it is too strict, the fact remains that it is reasonable and does not impair any constitutional rights. This, of course, is the test which must govern. See, Freund, The Supreme Court of the United States, p. 67 (Meridian Books ed., 1961).

2. The Scope and Effect of the Injunction

The injunction entered below was very narrow. It prohibited distribution of a single issue of seven magazines

found to be obscene, and it applied to one county only. If the publishers or distributors of these magazines believe that similar magazines or subsequent issues of the same magazines are not obscene, they can continue to sell these publications in Arkansas without fear of criminal prosecution. If they are wrong, and the other magazines are obscene, they may become subject to another injunction action. But, surely, this prospect will be less inhibiting than the prospect of a criminal prosecution, and, accordingly, much less likely to deter First Amendment freedoms.

3. Prior Authority

Kingsley Books, Inc. v. *Brown,* 354 U. S. 436 (1957), which upheld the constitutionality of section 22-a of the New York Code of Criminal Procedure, that State's obscenity injunction statute, is direct authority for the proposition that the injunction proceeding authorized by the Arkansas Act is constitutional. Indeed, the Arkansas Act does not go as far as the New York statute since section 22-a permitted an injunction *pendente lite* while the Arkansas Act does not. (An injunction *pendente lite* was entered in *Kingsley.*)

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. *Attorney General,* 383 U. S. 413 (1966) (hereinafter, *"Fanny Hill"*), seems to follow *Kingsley* in that this Court's opinion in *Fanny Hill* apparently approves of a Massachusetts obscenity injunction proceeding quite similar to the Arkansas proceeding here involved.

4. The Dissenting Opinions in *Kingsley*

The rationale of the dissenting opinions in *Kingsley,* if adhered to now, should not seriously challenge the constitutionality of the Arkansas Act. Five objections to New York Code of Criminal Procedure, section 22-a, were raised in the three *Kingsley* dissenting opinions. The first objec-

tion was that section 22-a permitted injunctions *pendente lite*. 354 U. S. at 445, 446 (opinions of Mr. Chief Justice Warren and Mr. Justice Douglas*). Since preliminary injunctions may not be had under the Arkansas Act, this problem can not exist here.

The second objection was that the section 22-a proceeding tried a book only, and did not focus upon the conduct of the individuals involved. *Id.* at 446-447 (opinions of Mr. Chief Justice Warren and Mr. Justice Douglas). The record in this case does not suggest that a book was tried rather than a person. The Arkansas Act is directed at persons and actions; it deals with "sending . . . selling, exhibiting or commercially distributing." (§ 5) The injunction below is binding only upon respondents, their agents, and those persons in active concert with them. (§ 11)

Moreover, in injunction and criminal proceedings under the Act, the Arkansas courts will (it should be presumed) take cognizance of the opinions of this Court and consider "the circumstances of production, sale, and publicity" in passing upon the question of obscenity. *Fanny Hill,* 383 U. S. at 420-421; see *Ginzburg* v. *United States,* 383 U. S. 463 (1966). There is no indication that they have not done this in the case at bar, and even if they did not do so, the omission is not caused by the statute.

The third objection raised against section 22-a was that it permitted destruction in the "absence of a prior judicial determination of illegal use." 354 U. S. at 446 (opinion of Mr. Chief Justice Warren). No matter what section 22-a may provide, a publication may be destroyed under the Arkansas Act only if it is found obscene at the close of a full adversary proceeding concerning its sale in or shipment into Arkansas. Moreover, only publications in

*Mr. Justice Black and Mr. Justice Brennan joined Mr. Justice Douglas' dissenting opinion.

the possession of resident respondents may be destroyed. (§ 10)

The fourth objection in the *Kingsley* dissents was that section 22-a did not treat every publication as "a separate offense which entitles the accused to a separate trial." *Id.* at 447 (opinion of Mr. Justice Douglas). Again, no matter how section 22-a may operate, it should be presumed that the Arkansas Act will be interpreted in light of the decisions of this Court, and that a defendant in an Arkansas injunction, contempt or criminal proceeding brought under the Act will not be enjoined or convicted if, because of different circumstances, a finding of obscenity is no longer warranted, even though such a finding had been made in a prior injunction action involving the same publication. See *Ginzburg* v. *United States, supra; Fanny Hill, supra.*

Moreover, although it is true that an injunction operates in the future, while a criminal conviction does not, and although it is true that a criminal defendant may be acquitted for the sale of a publication found obscene in a prior criminal action, the *in futuro* difference between criminal and civil obscenity proceedings is, at most, one in form. It is virtually inconceivable that a defendant convicted in Hot Springs will later try to sell the same publication in Little Rock. If, following a finding that he has sold an obscene publication, he is either convicted or enjoined, he will not, as a practical matter, sell that same publication again in that same state. If anything, the prospect of becoming a second (or third) offender will be more inhibiting than the prospect of contempt.

The fifth, and final, objection raised in the *Kingsley* dissents was that section 22-a did not provide a jury trial of right on the issue of obscenity. 354 U. S. at 447-448 (opinions of Mr. Justice Douglas and Mr. Justice Brennan). Although the Arkansas Act does not require a jury trial, the fact is that in the case at bar a jury found that defendants had sold obscene publications. Undoubtedly, the

same jury would have reached the same conclusion if it had been empanelled as a matter of right. (Experience indicates that juries are more likely than judges to find a particular publication obscene.)

In addition, *Mishkin* v. *New York*, 383 U. S. 502 (1966), and *Fanny Hill*, 383 U. S. 413 (1966), would seem to establish that juries are not indispensable in obscenity actions. In *Mishkin*, the defendant had no right to a jury trial and was convicted by a three-judge court; in *Fanny Hill* this Court found nothing objectionable about the non-jury equity proceeding below.

B. Neither the Act Nor the Order Below Affect the Publication, Possession or Distribution of Literature in any State Other than Arkansas.

Appellants argue that the Act, on its face, and as applied, seeks to operate outside of the State of Arkansas. (Appellants' Brief, pp. 5-11) Their argument ignores the clear language of both the Act and the decree.

No portion of either the Act or the decree, by its terms, has any extra-territorial effect. Indeed, section 10(a),* when read in conjunction with section 6(e),** clearly precludes any extra-territorial order.

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*Section 10(a) provides, in pertinent part:

"In the event the Courts [*sic*] finds the mailable matter to be obscene, it shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent prohibiting him from doing or continuing to do *any act condemned by this Act* . . . ." (Emphasis added.)

**Section 6(e) provides, in pertinent part:

"The action authorized in Section 5 shall be commenced by the filing of a complaint to which shall be attached as an

Although appellants suggest that the Act and order (apparently by implication) (a) require the destruction of publications outside of Arkansas (Appellants' Brief, p. 17) and (b) direct an Arkansas sheriff to seize publications in other states (Appellants' Brief, pp. 7, 10, 17), there is no suggestion that either appellants or the State of Arkansas have so interpreted the Act and order. It would be most surprising if, because of this action, appellants destroyed a single publication outside of Arkansas. It would be even more surprising if an Arkansas sheriff seized anything in any other state.

The few provisions of the Act and order which do not specifically define a geographical area should be interpreted as applying to Arkansas, at most. (The provisions of the order seem limited to Jefferson County.) In light of the purpose of the Act, and the well established limitations upon a state's power, any other interpretation would be illogical and contrary to established principles of statutory construction. *E.g., Kovacs* v. *Cooper,* 336 U. S. 77, 85 (1949); *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932).

Moreover, even if the Act or order contained extra-territorial provisions (and they do not), and even if such provisions were unconstitutional, it would not follow that the Act is unconstitutional. If the order contained im-

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exhibit a true copy of the allegedly obscene mailable matter. The complaint shall:

* * * *

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, *into this State* for sale or commercial distribution, or *in this State* preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away. . . . (Emphasis added.)

proper extra-territorial provisions, then those provisions only would be invalid; the rest of the order would remain unassailable. If the Act contained improper extra-territorial provisions, this would not; under the Act's separability clause (§ 18), effect the constitutionality of the Act's other provisions.* *E.g., Champlin Refining Co.* v. *Corporation Comm'n,* 286 U. S. 210, 235 (1932).

Finally, it should be noted that Arkansas is not attempting to impose its views upon any other state. Assuming, *arguendo,* that a writing can be obscene in Arkansas and not obscene in New York, the Act does not in any way interfere with the right to publish, sell or read that writing in New York. On the contrary, but for the Act, publishers outside of Arkansas might be able to subvert that State's policies against obscenity. Indeed, if state statutes comparable to the Arkansas Act are unconstitutional, the standards of the most permissive state might well be imposed upon the other 49.

C. The Jurisdictional Provisions of the Act Are Constitutional.

It can no longer be seriously contended that there is an offense to "traditional notions of fair play and substantial justice" (the constitutional standard for subjecting non-residents to the jurisdiction of a state court) if out-of-state publishers, who ship obscene publications into Arkansas, are subject to the jurisdiction of Arkansas courts in civil injunction actions concerning those publications. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316 (1945); *Rosenblatt* v. *American Cyanamid Co.,* 15 L Ed. 2d 39 (opinion of Mr. Justice Goldberg on motion for a stay of judgment), *appeal dismissed,* 382 U. S. 110 (1965); Currie, "The Growth of The Long Arm", 1963 U. Ill. L. Forum

*The separability clause of the Arkansas Act is not set forth in the Appendix to Appellants' Brief.

533, 538-560. Given Arkansas' vital interest in effective enforcement of its obscenity laws, and given appellants' shipments into that state of publications found obscene, the limited civil "long-arm" provision of the Arkansas Act is reasonable and constitutional, both on its face and as applied. *International Shoe Co.* v. *Washington, supra*; *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643 (1950); *McGee* v. *International Life Ins. Co.,* 355 U. S. 220 (1957); *St. Clair* v. *Righter,* 250 F. Supp. 148 (W. D. Va. 1966).

The obscenity laws of Arkansas would be seriously undermined if those who shipped obscenity into that state could not be held accountable in Arkansas civil proceedings for so doing. To hold the Act's "long-arm" provision unconstitutional would be to require Arkansas to enforce its obscenity laws in the courts of other states. This makes bad law enforcement, bad federalism, and bad sense.

> "When a manufacturer—or any other seller—knowingly sends something into a state for his own economic gain, it does not seem unjust to expect him to answer there for the consequences. It would be odd if in a federal system Illinois could not enter a judgment against a man who stands in Indiana firing his gun at people in Illinois; the man who ships in unwholesome food is in no different situation." (Currie, *supra* at p. 549)

See the following cases in which, in actions involving their goods, out-of-state manufacturers were held to be proper parties in the courts of states into which they shipped. *S. Howe Co.* v. *W. P. Milling Co.,* 277 P. 2d 655 (Okla. 1954), *appeal dismissed by stipulation,* 348 U. S. 983 (1955) (cited with approval in *McGee* v. *International Life Ins. Co.,* 355 U. S. 220 at 223 n. 2 (1957)); *Gray* v. *American Radiator & Standard Sanitary Corp.,* 22 Ill.

2d 432, 176 N. E. 2d 761 (1961); *Singer* v. *Walker*, 15 N. Y. 2d 443, 464-467, 209 N. E. 2d 68, 80-82 (1965); *Nixon* v. *Cohn*, 62 Wash. 2d 987, 385 P. 2d 305 (1963); *McKee* v. *Brunswick Corp.*, 354 F. 2d 577 (7th Cir. 1965).

See also the following cases in which publishers were held subject to criminal suit, under the postal laws, in the states into which their publications were shipped: *United States* v. *Collier*, 183 F. Supp. 47 (E. D. Va.), *aff'd*, 283 F. 2d 780 (4th Cir. 1960), *cert. denied*, 365 U. S. 833 (1961); *United States* v. *Luros*, 243 F. Supp. 160 (N. D. Iowa), *cert. denied*, 382 U. S. 956 (1965); *United States* v. *Frew*, 187 F. Supp. 500 (E. D. Mich. 1960).

Furthermore, even if lack of personal jurisdiction could be seriously argued, these appellants should not be permitted to raise that issue. The record shows that the publisher appellants voluntarily appeared in this action, notwithstanding the fact that they were not named as defendants in the complaint. The record further shows that they never alleged lack of jurisdiction. (3-12) This, alone, should preclude any attack upon the constitutionality of the "long-arm" provision. *Head* v. *New Mexico Board of Examiners*, 374 U. S. 424, 433 n. 12 (1963); *Walters* v. *City of St. Louis*, 347 U. S. 231, 233 (1954).

D. The Act, on Its Face and as Applied, Does Not Interfere With Congress' Power to Regulate the Mails.

At pages 12 and 13 of their brief, appellants state that Act 261, in violation of the "paramount powers of Congress", (a) improperly "seeks to control the shipment of publications by mail", and (b) "single[s] out and emphasize[s] 'mailable matter' for proscription from mailing". This argument fails both on the facts and on the law.

1. The Absence of Interference With Federal Regulation

The Act applies only to publications which cannot be legally mailed (see 18 U. S. C. A. § 1461) or which have been found obscene by an Arkansas Court after a full hearing under section 4 of the Act. There is no reason to find or assume that the Act actually or potentially interferes with the mails, particularly since mailing of a publication found obscene under the Act would almost certainly violate federal law. (The definition of obscenity contained in the Act (§ 3(2)) is the same as the definition applied in federal prosecutions for mailing obscenity. *Roth* v. *United States*, 354 U. S. 476, 489 (1957).) Surely, the presence of a postage stamp cannot make a publication non-obscene, and nothing in the postal laws or postal regulations suggests that one purpose of the postal service is to impede a state's regulation of obscenity within its borders.

This issue was authoritatively resolved in *Alberts* v. *California*, 354 U. S. 476 (1957). There, the defendant argued that since he was using the mail extensively, the postal laws precluded California from impeding his activities. The Court considered the question "whether Congress, by enacting the Federal obscenity statute . . . pre-empted the regulation" of Alberts' activities by California. 354 U. S. at 480. Mr. Justice Brennan, writing the opinion of the Court, discussed and answered this question as follows:

> "Alberts argues that because his was a mail-order business, the California statute is repugnant to Art. I, § 8, cl. 7, under which the Congress allegedly pre-empted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material. The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish 'keeping for sale' or 'advertising' obscene material. The state

> statute in no way imposes a burden or interferes with the federal postal functions. '. . . The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . .' *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 96." (*Id.* at 493-494.)

The same rule should apply in the case at hand.

Neither the California statute upheld in *Alberts* nor the Arkansas Act in suit here prohibits the act of mailing. They prohibit only possession, distribution, etc. and, in the case of Arkansas, importation of obscene matter. Distribution and importation can be effected through many instrumentalities, of which the mail is only one. Appellants have advanced no arguments supporting the proposition that Arkansas' power to prohibit the dissemination of obscenity should not extend to the panderer who chooses to disseminate it in Arkansas through the mail.

Analogous situations are presented by state "Blue Sky" laws prohibiting the advertisement and sale of unregistered securities, and by state laws prohibiting the conduct of lotteries or the obtaining of money by fraud. The existence of the federal securities laws (15 U. S. C. A. §§ 77a-78gg) and federal statutes prohibiting the use of the mails for the conduct of lotteries (18 U. S. C. A. § 1302) or for fraudulent schemes (18 U. S. C. A. §§ 1341 and 1342) do not render such state statutes inoperative when the activities they prohibit are carried on through the mails.

As this Court said in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944):

> "It is settled that, for Constitutional purposes, certain activities of a business may be intra-state

> and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation and there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities, the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated." (*Id.* at 548.) (Footnotes omitted.)

The postal laws do not make peddlers of obscenity any more immune from state regulation than those who use the mails to misrepresent securities, conduct lotteries or perpetrate frauds.

2. The Favored Treatment of Mailable Matter

It is true, as appellants contend, that Arkansas has singled out for special treatment literature which it has defined as "mailable matter". However, "mailable matter", as defined in the Arkansas Act, has been singled out by Arkansas not for proscription, but for special protection. As we have seen above, because of the statutory definition of "mailable matter", the criminal provisions of the Act can only be applied if the publication in question lacks second class mailing privileges *and* has been held nonmailable under the laws of the United States, unless it has, *to the defendant's knowledge*, been held obscene in a prior civil action under the Act. (§§ 3(1), 4, p. 6, *supra*)

Thus, Arkansas has accorded much greater deference to second class mailing privileges than have some other states, which give no special treatment to publications with such privileges—for example, Kentucky. See *Austin* v. *Kentucky* (Oct. 1966 Term, No. 16).

3. Appellants' Authorities

Appellants' authorities on the postal issue are not in point. (See Appellants' Brief, pp. 12-13) Re *Jackson*, 96 U. S. 727 (1877), *Lewis Pub. Co.* v. *Morgan*, 229 U. S. 288 (1913), *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962), and *Roth* v. *United States*, 354 U. S. 476 (1957), are merely cases which announce, or assume, that Congress has the power to regulate the use of the mails—a proposition which is not in dispute here.

In *Pensacola Tel. Co.* v. *Western*, 96 U. S. 1 (1877), and *Illinois Central R.R.* v. *Illinois*, 163 U. S. 142 (1896), the state regulation was directly contrary to the federal regulation—clearly not the case here, since Arkansas' regulation of obscenity is entirely consistent with federal regulation of that subject. See *Roth* v. *United States*, 354 U. S. 476 (1957); *Ginzburg* v. *United States*, 383 U. S. 463 (1966).

Grosjean v. *American Press Co.*, 297 U. S. 233 (1936), is similarly distinguishable since it involves a head-on interference with freedom of the press through the imposition of a direct tax upon newspapers. In the case at bar, of course, we are not dealing with constitutionally protected literature.

Finally, *Cooley* v. *Board of Wardens*, 53 U. S. 299 (1851), is, if anything, authority against appellants' postal law argument, since the Court there held that the commerce clause did not prohibit states from passing laws regulating pilots, in the absence of federal statutes clearly pre-empting the field.

4. Severability

Here also, even if appellants' contentions are correct, neither the Act nor the order must be stricken down in its entirety. If Arkansas cannot prevent out-of-state publishers from mailing into Arkansas literature found to be obscene in actions against those publishers, the order can be modified accordingly and the Act can be applied in the light of any such limitation. No matter what the postal laws may provide or require, those portions of the Arkansas Act and of the decree which have nothing to do with the mails should remain intact. See section 18 of the Arkansas Act; see also *Champlin Refining Co.* v. *Corporation Comm'n.*, 286 U. S. 210, 235 (1932).

E. The Act, on Its Face and as Applied, Does Not Interfere With Congress' Power to Regulate Interstate Commerce.

The Arkansas Act affects interstate commerce only insofar as it makes it a crime to send or bring nonmailable obscene matter into Arkansas (§ 4) and permits the State to obtain an injunction against the importation of obscene matter (§§ 5-6 and 10-11). The commerce clause does not prohibit this limited use of the State's police power. The law is clear that so long as the state regulation does not conflict with federal law, a state may, consistent with the commerce clause, prohibit the importation of material which it reasonably determines to be dangerous to the health or welfare of its citizens. *Asbell* v. *Kansas;* 209 U. S. 251, 256-258 (1908); *Reid* v. *Colorado,* 187 U. S. 137 (1902); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 548-549 (1944).

Appellants have not cited, and we have not discovered, any federal legislation in conflict with Arkansas Act. As in *Asbell* v. *Kansas, supra,* the comparable federal legis-

lation (18 U. S. C. A. § 1461) is fully consistent with the state legislation. Given the absence of conflicting federal legislation, and given the right of the states to prevent the distribution of obscenity pursuant to their police power (*e.g., Mishkin* v. *New York*, 383 U. S. 502 (1966)), the Arkansas Act is unassailable under the commerce clause.

The cases cited by appellants in support of their commerce clause argument (Appellants' Brief, p. 13) are not in point. Both *Bowman* v. *Chicago & N. W. Ry.*, 125 U. S. 465 (1888) and *Leisy* v. *Hardin*, 135 U. S. 100 (1890) involved state statutes prohibiting the importation of intoxicating liquors as such into the states in question, with certain narrow exceptions. They would be in point if the Arkansas Act sought to prevent the distribution of obscenity within Arkansas by prohibiting the importation of *all* matter dealing with sex. The Act does not do this however; it merely prohibits the importation of certain obscene matter, and is therefore analogous to the quarantine cases cited above (*Asbell* v. *Kansas*, *supra*; *Reid* v. *Colorado*, *supra*), and not to appellants' liquor cases.

Appellants' argument that "what was said of alcoholic beverages [in the *Bowman* and *Leisy* cases, *supra*] applies with greater force to literature" is completely inapposite since the Arkansas Act does not deal with "literature", but only with "obscene matter" which, this Court has held, enjoys no constitutional protection at all. *Roth* v. *United States*, 354 U. S. 476 (1957).

Finally, once again, even if appellants were right, they would be entitled to no more than a holding that the decree and Act may not prohibit shipments from outside of Arkansas into Arkansas, provided that the shipments do not violate federal law. Those portions of the Act and decree which regulate sale and possession entirely within Arkansas should not be affected by any holding pursuant to the commerce clause.

POINT II

THE STATUTE IS NOT VOID FOR VAGUENESS.

Appellants contend that the terms "obscenity" and "other than mailable matter" are vague (Appellants' Brief, pp. 14-16). It is not clear whether they further contend that this alleged vagueness makes the statute unconstitutional. But, whatever they may contend, these terms pose no constitutional problem.

The statute's definition of "obscenity" is taken verbatim from the definition in *Roth* v. *United States,* 354 U. S. 476, 489 (1957). There is less vagueness in the Arkansas Act's use of the term "obscenity" than there is in the statutes involved in *Alberts* v. *California,* 354 U. S. 476, 479-480, n. 2 (1957), *Mishkin* v. *New York,* 383 U. S. 502, 503, n. 1 (1966), *Ginzburg* v. *United States,* 383 U. S. 463, 464-465, n. 2 (1966), and *Fanny Hill,* 383 U. S. 413, 421-422 (1966).

As appellants note, the Act does not state whether the appropriate "community" for "applying contemporary community standards" is local or national. However, this problem has not been resolved by a majority of this Court, and statutes which do not define this "community" have been upheld by this Court. *Roth* v. *United States, supra; Alberts* v. *California, supra; Mishkin* v. *New York, supra; Ginzburg* v. *United States, supra.*

We agree with appellants that a national standard should be required. However, even if the Court is now prepared to declare that the standard is national, it would not follow that the Act's definition of obscenity must be held unconstitutionally vague. The question of definition can be resolved—and this appeal fairly disposed of—by holding that in future proceedings under the Act the "com-

munity" must be national, and by further holding that the decree below is invalid since the standards of a local community may have been applied.

The objection concerning the term "other than mailable matter" seems frivolous. It is hard to see how a statutory definition could be more clear or precise:

> "(1) 'Mailable matter' means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States." (§ 3)

Lest there be any doubt, "other than mailable matter" means that which is not mailable.

Moreover, even if there were some ambiguity in either of the terms complained of, *Roth* v. *United States, supra,* would fully dispose of appellants' objections:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States* v. *Petrillo,* 332 U. S. 1, 7-8." (354 U. S. at 491)

POINT III

THE DECREE DOES NOT ENJOIN THE DISTRIBUTION OF FUTURE ISSUES AND THE ACT DOES NOT PERMIT ANY SUCH INJUNCTION.

Appellants contend that there is an "injunction against future issues". (Appellants' Brief, p. 16) This is just not so.

Although the trial judge indicated during colloquy on April 29, 1964, that he might enjoin future issues (33), the injunctive provisions of the decree, which are dated May 13, 1964, are limited to the specific issues introduced into evidence, and do not in any way relate to future issues (28-30). (Between the date of the colloquy and the date of the decree, the trial judge apparently determined that, no matter what he might have said, he could not enjoin future issues; he obviously framed his decree accordingly.)

It is the decree which restrained appellants and which is being appealed from, not any pre-decree colloquy between court and counsel. Moreover, if there were some doubt concerning the scope of the decree, the holding of the Supreme Court of Arkansas that the decree "does not enjoin future issues" should put the question to rest. *Gent* v. *Arkansas*, 393 S. W. 2d 219, 226 (1965).

Of course, even if the decree did apply to future issues, the remedy would be to strike that portion of the decree only, and to leave the balance of the decree—and the Act—otherwise intact.

CONCLUSION

In 1961 Arkansas, by enacting the statute here under attack, sought to protect its citizens from obscenity without, in any way, limiting the freedoms guaranteed to them by the First and Fourteenth Amendments. Adhering closely to the decisions of this Court, Arkansas did this by providing for both civil and criminal proceedings. Many other states have followed a similar course. (See p. 4, above.) We respectfully submit that Arkansas has solved this difficult problem with precision and delicacy, and with due regard for the interests of its citizens and the requirements of the Federal Constitution as interpreted by this Court. Arkansas' regulatory scheme does not impede First Amendment Freedoms, while an exclusive criminal remedy would. It should not be stricken down.

The Arkansas Act should be declared constitutional. However, the decree should be vacated on the grounds (a) that the publications in question are not obscene, and (b) that the "contemporary community standards" of the nation should have been applied.

Respectfully submitted,

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Appendix A

ARKANSAS ACTS OF 1961

ACT 261

* * * * *

SECTION 1. This Act shall be known as the Arkansas Law on Obscenity and may be referred to by that designation.

SECTION 2. PURPOSE AND INTENT OF ACT. The General Assembly hereby determines that during the past several years, the spread of obscene publications has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of this State against those publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing prosecuting attorneys both with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within the State.

SECTION 3. DEFINITIONS. The following words, terms and phrases used in this Act shall, for the purpose of this Act, have the meanings respectively ascribed to them in this Section:

(1) "Mailable matter" means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States.

(2) "Obscene" means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(3) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(4) "Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story paper or other printed or written matter. It does not include written or printed matter or material used by or in any recognized religious, scientific or educational institution.

SECTION 4. CRIMINAL PROVISIONS. (1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this State for sale or commercial distribution, or in this State prepares, publishes, sells, exhibits or commercially distributes, or give away or offers to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act, or who knowingly informs another of when, where, how or from whom or by what means any of these things can be purchased or obtained, shall be guilty of a felony, and upon conviction thereof shall be fined not more than $2,000.00 or be imprisoned for a period not less than one (1) year nor more than five (5) years, or be both so fined and imprisoned.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter

or materials, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000.00 or be imprisoned in the county jail for a period not to exceed one year, or both.

SECTION 5. MAILABLE MATTER, COMMENCEMENT OF ACTION. Whenever the Prosecuting Attorney for any county has reasonable cause to believe that any person, with knowledge of its contents, is

(1) Engaged in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or is

(2) In this State preparing, selling, exhibiting or commercially distributing, or giving away, or offering to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or give away or offer to give away, any obscene mailable matter, the Prosecuting Attorney for the county into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, shall institute an action in the Chancery Court for that county for an adjudication of the obscenity of the mailable matter.

SECTION 6. ACTION TO DECLARE MAILABLE MATTER OBSCENE. The action authorized in Section 5 shall be commenced by the filing of a complaint to which shall be attached as an exhibit a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as respondents and list the names and addresses, if known, of its author, publisher, and any other person sending or causing it to be sent, bringing or causing it to be brought into this State for sale or commercial distribution and of any person in this State preparing, selling, exhibiting or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this State preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(f) pray for its surrender, seizure and destruction.

SECTION 7. ORDER TO SHOW CAUSE. Upon the filing of the complaint described in Section 6, the Prosecuting Attorney shall present the same, including the exhibit thereto, as soon as practicable to the Court for its examination. If there is no probably [*sic*] cause to believe that the mailable matter described in the complaint is obscene, the Court shall dismiss the complaint. If the Court finds probably [*sic*] cause to believe such mailable matter to be obscene it shall issue an order to show cause why the same shall

not be adjudicated obscene, returnable not less than ten (10) days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order or any copy thereof may be made in any manner provided by law, and in case of mailable matter published or edited outside of the State of Arkansas and of any non-resident respondent, by registered or certified mail directed to the mailable matter of the respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such rule or a copy thereof upon the mailable matter or any respondent for the purposes of this Section.

SECTION 8. ANSWER, TRIAL DATE. (1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may file answers or other defenses.

(2) The court may, by order, permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answers or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate judgment.

(4) Upon the expiration of the time for filing answers and other defenses by the mailable matter and all respond-

ents the Court may, upon its own motion or upon the application of any party, set a date for the trial of the issues joined.

SECTION 9. PUBLIC POLICY, PROCEDURE. The public interest requires that all actions prescribed in this Act, other than criminal actions under Section 4 be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions.

SECTION 10. JUDGMENT. In the event the Courts finds the mailable matter to be obscene, it shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent prohibiting him from doing or continuing to do any act condemned by this Act;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the court may find to be reasonable;

(c) if any respondent shall fail to comply with the Court's orders, direct all sheriffs in the State to seize and destroy all such obscene mailable matter in the possession or under the control of such respondent wherever the same may be found.

SECTION 11. INJUNCTIONS. Every order granting an injunction shall set forth the reasons for its issuance; shall

be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the respondents to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation by contract or arrangement with them who receive actual notice of the order by personal service or otherwise.

Copies of all orders of the Court in [*sic*] finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all persons; and in the same manner, as is provided in Section 7 of this Act.

SECTION 12. WHEN MAILABLE MATTER IS NOT EXEMPT. Any mailable matter which is sent or caused to be sent, brought or caused to be brought, into this State for sale or commercial distribution or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away, by any person with knowledge of the judgment, or is in the possession of any such person with intent to sell or commercially distribute or exhibit or give away or offer to give away, is subject to the provisions of Section 4.

SECTION 13. CONTEMPT. Any respondent, or any officer, agent, servant, employee or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered pursuant to Section 11 and who shall disobey any of the provisions thereof, shall be guilty of contempt of court.

SECTION 14. EXTRADITION. In all cases in which a court has entered its judgment, pursuant to Section 10,

that the mailable matter in question is obscene, and a charge of continuing violation is hereafter brought against a person who, being a respondent to such judgment, cannot be found in this State, the Governor of this State shall, unless such person shall have appealed from such judgment and such appeal has not been finally determined, demand his extradition from the Executive Authority of the State in which such person may be found, pursuant to the laws of this State.

SECTION 15. The possession of any three (3) of the things enumerated in Section 4 of this Act (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor.

SECTION 16. NON-RESIDENTS, JURISDICTION, PROCESS, CONSENT. In order to protect the morals and general welfare of the citizens and residents of this State against obscene printed or written matter or material originating outside this State, it is the purpose of this Section to subject to the jurisdiction of the courts of this State those persons who are responsible for the importation of such matter into this State and, by such act submits himself to the jurisdiction of the courts of this State in any action authorized by Section 5.

SECTION 17. All laws and parts of laws in conflict herewith are hereby repealed.

SECTION 18. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

APPROVED: March 14, 1961.

Appendix B

INTRODUCTION TO CPDA PROPOSED STATUTE*

The Council for Periodical Distributors Associations (formerly known as the Council for Independent Distribution) is a voluntary non-profit association of wholesalers who supply newspapers, magazines and paper-backed books to the more than 142,000 retail outlets in the United States and Canada.

As citizens of the communities in which they work and live, the members of the Council since its organization on September 23, 1955 have become increasingly concerned with the spread of objectionable publications. Existing legislation, much of it of an early vintage, has in many instances been practically or constitutionally inadequate to cope with obscenity in publications, and has therefore often failed to supply the necessary corrective force to the problem.

On behalf of its membership, the Council is pleased to present for legislative consideration the attached anti-obscenity statute. Such proposed statute is the result of both the Council's original draft of May 2, 1960 and of valuable suggestions which have since been offered for its improvement by interested parties concerned with the problem of obscenity in literature. The Council feels, from the years of practical experience of its membership in the wholesaling of periodicals, that the following principles of the proposed statute are sound and if enacted will be effective. These principles are:

First, to provide public prosecutors with a speedy means to obtain a judicial determination of the contents of any

*Revised as of December 12, 1960.

publication. This is to be found in the provision for an immediate court review of questioned publications and, if probable cause is found to believe that any such matter is obscene, for the authorization of summons with the consequences attendant upon such issuance.

Second, to provide as immediate a protection as constitutionally possible of the morals and general welfare of the public. This is to be found in the section authorizing temporary restraining orders and preliminary injunctions.*

Third, to furnish public prosecutors with authority to reach non-residents responsible for the composition, publication and distribution of obscene publications. This is to be found in the sections dealing with extraterritorial service of process and consequent amendability to court orders, penalties for disobedience of court injunctions, responsibility for court fines, and extradition.

Fourth, to eliminate the situation under which resident wholesalers and dealers have most often unfairly been the crucible in which the obscenity of a challenged publication has been tested. To date, such challenge has customarily been by criminal arrest and trial with its attendant and often unjustified odium. Whether the outcome of such trial results in the acquittal of the wholesaler or dealer is dependent in large measure upon his ability correctly to predict at the start of his distribution through his uninformed judgment the legal propriety of the publication in question, a hazardous occupation for which he has no training or desire to exercise a unilaterial censorship.

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*The Arkansas Act does not permit injunctions *pendente lite*.

Appendix B

Recognizedly, many technical provisions of the proposed statute are subject to change in order to comply with the nomenclature, procedures and individual and often diverse requirements of the several States and Provinces. But practically, if the four principles of the measure are observed, the statute should be an effective step forward in the battle against obscenity.